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In the Supreme Court of the United States

SHAFIQ RASUL, ET AL.,
Petitioners,
v.
GEORGE W. BUSH, ET AL.,
Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Petitioners,
v.
UNITED STATES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF RETIRED MILITARY OFFICERS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are three retired military officers. Each one formerly served as the Judge Advocate General or the senior legal advisor for a branch of the United States military, and has extensive experience with U.S. military regulations and the Laws of War. Each dedicated his military career to the principle that the mission of the nation's Armed Forces must be consistent with the rule of law.

The principal purpose of this brief is to explain to the Court the profound ramifications, from a military point of view, of the government's position that no court can decide whether foreign prisoners at the United States Naval Base at Guantanamo Bay, Cuba may be held there without any charges being brought against them and without being afforded a hearing by a "competent tribunal" to determine their status, as required by U.S. military regulations and the Geneva Conventions of 1949. Amici are concerned that foreigners capturing American forces in current or future conflicts will use the failure of the United States to follow the competent tribunal requirement in the Geneva Conventions at Guantanamo as justification for refusing to apply the Geneva Conventions to American captives.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the amici curiae has made a monetary contribution to the preparation and submission of this brief.

was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired from the military. General Brahms is currently in private practice in Carlsbad, California and is a member of the Board of Directors of the Judge Advocates Association. He also served as the Technical Advisor for the film *A Few Good Men*.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After a break for law school, he returned to the Navy in 1977 and remained in the Navy until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002. Rear Admiral Guter was in the Pentagon when it was attacked by terrorists on September 11, 2001.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. He is presently the Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire.

SUMMARY OF ARGUMENT

For more than 200 years, the United States has been at the forefront of international efforts to codify and safeguard the rights of prisoners captured in wartime. Those efforts resulted, after World War II, in the Geneva Conventions of 1949, which the Senate ratified in 1955. Key provisions of those Conventions have been incorporated in American military regulations, including the requirement that the status of captured persons must be determined by a competent tribunal if there is any doubt that the captives are prisoners of war to whom the protections of the Geneva Conventions apply.

The requirement that prisoners' status be determined by a competent tribunal comports with the fundamental principle that the Constitution established a government of limited powers. The government should not be permitted, through

Executive fiat, to imprison persons indefinitely when no charges have been brought against them and the prisoners are barred from all access to courts and other tribunals to determine their status.

The government's contention is that no court anywhere on earth has jurisdiction even to entertain the Guantanamo prisoners' claims—that the federal courts could not intervene even if prisoners there were being executed or tortured. The government's position is based on the proposition that only Cuba, not the United States, has sovereignty over the base. But under the governing agreements with Cuba—which afford the United States "complete jurisdiction and control" over the base in perpetuity—the United States exercises, at a minimum, some sovereign powers over the base. Military officials have long regarded the lease, executed in 1903, as providing that Cuban sovereignty is interrupted while the lease remains in force; Cuba has only residual sovereignty. In the meantime, the United States acts as the "pro tanto sovereign" of the base, as the State Department's Office of the Solicitor concluded in 1912. Scholars have agreed that the United States exercises at least some sovereign powers at Guantanamo.

Applying the rule of law to the Guantanamo prisoners is especially important to the members of the United States Armed Forces. American troops are dispatched regularly on a wide variety of missions around the globe. If any of them are captured, our government will undoubtedly insist that they be treated in accordance with the principles of the Geneva Conventions. But if the United States refuses to apply the competent tribunal requirement in the Geneva Conventions to the prisoners being held at Guantanamo, it increases the likelihood that foreign authorities holding American captives will decide to ignore the Geneva Conventions entirely —thereby putting the lives of American prisoners at risk.

ARGUMENT

I. The United States Has Played A Leading Role In Developing International Standards To Safeguard The Rights Of Captured Prisoners.

The United States has long "been a leader in the development of th[e] trend * * * of bettering the humanitarian principles invoked in the treatment of prisoners of war." Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 MIAMI L.Q. 40, 41 (1950). A 1785 treaty between the United States and Prussia "probably constituted the first international attempt to provide in time of peace for the protection of prisoners of war." Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 5-6 (1977). In 1863, Abraham Lincoln commissioned Dr. Francis Lieber to draft a code of conduct for the Union army in treating prisoners of war. *Id.* at 7. The Lieber Code, as it came to be known, "was perhaps the first formal codification of rules governing the treatment to be accorded prisoners of war," Dillon, 5 MIAMI L.Q. at 42, and it "had a significant influence on the attitude of nations and on the subsequent Hague Conventions of 1899 and 1907," *ibid.*, which were "the first effective multilateral codification[s] of the law of war," Levie, PRISONERS OF WAR, at 8. After World War I, the United States and Germany entered into an agreement concerning the treatment of prisoners of war. Dillon, 5 MIAMI L.Q. at 42. The subsequent 1929 Geneva Convention Relative to the Treatment of Prisoners of War, signed by the United States and more than 40 other nations, bore "a striking resemblance to the United States-German agreement." *Id.* at 43.

The Geneva Convention of 1929 played a significant role during World War II. Scholars have concluded that "'the fact that millions of prisoners of war from all camps, notwithstanding the holocaust, did return, is due exclusively

to the observance of the Geneva Prisoners of War Convention.'" Levie, PRISONERS OF WAR, at 10 n.44. "The American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany during World War II to compliance with the 1929 Convention." *Ibid.*

But the treatment of prisoners of war during World War II also indicated that the Geneva Convention of 1929 required substantial revision to broaden and clarify the circumstances under which its protections would apply. *Id.* at 10-11. Some countries had argued that the 1929 Convention did not apply to protect prisoners when the invading country had not formally declared war; Germany had claimed that the 1929 Convention did not apply to Polish prisoners because the Polish government ceased to exist; and Germany had contended as well that the 1929 Convention did not apply to French prisoners because France ceased to be a belligerent after signing an armistice with Germany. *Id.* at 11-12.

Following World War II, an American general suggested to the President of the International Committee of the Red Cross ("ICRC") that "a meeting of experts on prisoner of war affairs of the various belligerent nations be called with the view of recording for future reference, their experiences under the Convention of 1929." Dillon, 5 MIAMI L.Q. at 43. The ICRC agreed, and sent invitations "to all of the belligerents of World War II." *Ibid.* The United States went on to play "a major role both in the prepatory steps and in the conference proceedings." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Committee on Foreign Relations*, 84th Cong., 1st Sess., at 3-4 (1955) ("Senate Hearing") (statement of Robert Murphy, Deputy Under Secretary of State). A series of meetings involving the United States and other nations resulted in the four Geneva Conventions of 1949, including the Geneva Convention

Relative to the Treatment of Prisoners of War. Dillon, 5 MIAMI L.Q. at 43.

The Senate debate on ratification of the 1949 Conventions suggests that two basic principles animated the Senate's eventual decision to ratify. First, there was a belief that it was critical for the United States to lend its moral authority to the Conventions and to provide a model for other nations to follow in treating prisoners of war. In urging Senate approval, Secretary of State John Foster Dulles stated that American "participation is needed to enlist the authority of the United States in the[] interpretation and enforcement" of the Conventions. Senate Hearing at 61. Secretary Dulles went on to express the view that "United States ratification of the Geneva Conventions, by lending further support to their standards, should influence favorably future behavior toward prisoners of war." *Id.* at 68.

Second, by treating prisoners of war in accordance with the 1949 Conventions, the United States believed that it would encourage its enemies to reciprocate in their treatment of American prisoners of war. Deputy Under Secretary of State Murphy informed the Senate Committee on Foreign Relations that although neither North Korea nor the United States had ratified the 1949 Conventions at the time of the Korean War, "the moral acceptance of the conventions as a general norm did have some effect on" North Korea's treatment of American prisoners of war during the war. *Id.* at 5. Looking to the potential for future conflicts, Secretary Dulles explained that American "participation is needed to * * * enable us to invoke them for the protection of our nationals." *Id.* at 61. Similarly, Senator Mike Mansfield stated that "it is to the interest of the United States that the principles of these conventions be accepted universally by all nations." 101 Cong. Rec. 9960 (July 6, 1955). Senator Mansfield explained that American "standards are already high. The conventions point the way to other governments. Without any real cost to

us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment." *Ibid.* Senator Alexander Smith concurred: "I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is our own United States. * * * To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment." *Id.* at 9962.

II. The Geneva Conventions And U.S. Military Regulations Implementing The Conventions Require That A Competent Tribunal Determine The Status Of Captured Prisoners.

The second paragraph of Article 5 of the Third Geneva Convention of 1949 provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

The same requirement has been adopted in American military regulations:

> All persons taken into custody by U.S. forces will be provided with the protections of the GPW [1949 Geneva Convention on Prisoners of War] until some other legal status is determined by competent authority.

United States Dep't of Army, Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," § 1-5(a)(2) (Oct. 1, 1997).[2] The regulation further provides (*id.* § 1-6):

> (a) In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated under Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
>
> (b) A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

The United States "has in the past interpreted [Article 5] as requiring an individual assessment of status before privileges can be denied. Any individual who claims POW status is entitled to an adjudication of that status." Jennifer Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism*, CRS REPORT FOR CONGRESS 29 (Apr. 11, 2002). See also Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55, 65 (Fall 2003) (Article 5 requires "individualized determinations"); Constitution Project, RECOMMENDATIONS FOR THE USE OF MILITARY

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[2] Regulations for the other branches of the military contain the same provisions discussed in the text. See OPNAVINST 3461.6 (Navy); AFJI 31-304 (Air Force); MCO 3461.1 (Marine Corps).

COMMISSIONS 3 (Sept. 18, 2002) ("all captives asserting POW status should be granted the individualized determinations envisaged by Army regulations").

Moreover, it is Department of Defense policy to comply with the Laws of War, including the Geneva Conventions, "in the conduct of military operations and related activities in armed conflict, *however such conflicts are characterized.*" Judge Advocate General's School, OPERATIONAL LAW HANDBOOK 10 (O'Brien, ed. 2003) (emphasis added); see also Department of Defense Directive No. 5100.77, ¶ 5.3.1 (Dec. 9, 1998). Thus, the military instructs its Judge Advocates that they "should advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status may be determined." OPERATIONAL LAW HANDBOOK at 22. See also U.S. Marine Corps, The Basic School Training Command, LAW OF WAR/CODE OF CONDUCT 10 (Dec. 2002) (instructing Marine Corps cadets that "[e]veryone who is captured or detained during a conflict should therefore be treated as the Geneva POW Convention requires until the proper tribunal can judge his or her case").

III. The Judicial Branch Has A Duty To Act As A Check On The Executive Branch, Even In Wartime.

In times of war, this Court has deferred to a considerable extent—and properly so—to the military and to the Executive Branch. But this case poses an issue that this Court has never decided: whether American courts have jurisdiction to consider the claims of foreigners captured by American forces, who are imprisoned indefinitely, without charges, based simply on the government's say-so, and who have been denied access to any court or "competent tribunal" to determine their status.

The D.C. Circuit's answer was that the courts have no role; the Executive Branch's indefinite imprisonment of

petitioners cannot be challenged in any court or tribunal. But complete judicial deference on this point is at odds with the specific military regulations already discussed. It is irreconcilable, too, with the limited government that the Founding Fathers adopted.

The Constitution was designed to "guard[] the foundations of civil liberty against the abuses of unlimited power." *Ex parte Milligan*, 71 U.S. 2, 126 (1866). The Constitution must impose some limits on the authority of government officials to pronounce that detainees may be held indefinitely, without being charged and without any sort of hearing or judicial process. "Such a practice, once established with the best of intentions, will drift into oppression * * * in this country as surely as it has elsewhere." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 226 (1953) (Jackson, J., dissenting). "[D]ifferences in the process of administration make all the difference between a reign of terror and one of law." *Ibid.* Thus, although the courts "must accord great respect and consideration to the judgments of the military authorities," it is "essential that there be definite limits to military discretion." *Korematsu* v. *United States*, 323 U.S. 214, 233-234 (1944) (Murphy, J., dissenting). See also *Shaughnessy*, 345 U.S. at 218 (Black, J., dissenting) (no "governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice").

To be sure, this is a perilous time, as the President has stated. But that does not justify indefinite confinement without any type of hearing or judicial review. Indeed, during previous wars, the United States has conducted Article 5 hearings to determine whether captured persons should be accorded POW status under the Geneva Conventions. Department of Defense, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 578 (1992) (1,196 Article 5 hearings were conducted during the 1991 Gulf War; 886 persons were found to be civilians); *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT'L. L. 754, 768-775 (1968) (hearings during the Vietnam war). And as of May 2003, the military had held "50 to 100" Article 5 hearings to determine the status of detainees in the 2003 Iraq War. Department of Defense, *Briefing on Enemy Prisoner of War Status Categories, Releases and Paroles* (May 9, 2003); see also Department of Defense News Briefing (Apr. 7, 2003) (the United States treated all detainees during the 2003 Iraq War as prisoners of war before holding Article 5 tribunals).

Nor do the September 11 attacks and the ensuing war on terrorism mean that courts may abdicate their vital role in our constitutional system of checks and balances. As Benjamin Franklin cautioned long ago, "[t]hose who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety." Benjamin Franklin, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA, title page (1759) (Arno Press reprint 1972). This Court has made clear that "the duty * * * rests on the courts, *in time of war as well as in time of peace*, to preserve unimpaired the constitutional safeguards of civil liberty." *Ex parte Quirin*, 317 U.S. 1, 19 (1942) (emphasis added). "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion). In fact, this Court heard and decided *Quirin* in the summer of 1942, only eight months after the Japanese attack on Pearl Harbor, when the outcome of the Second World War was still very much in doubt. See also *Sterling* v. *Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in

a particular case, are judicial questions"); *Milligan*, 71 U.S. at 121 (the "pernicious" idea that a Constitutional provision "can be suspended during any of the great exigencies of government * * * leads directly to anarchy or despotism"); *Brown* v. *United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting) (although the President in wartime "has a discretion vested in him * * * he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims"). If courts do not "abide by the Constitution" in wartime, "they cease to be civil courts and become instruments of military policy." *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting).

Furthermore, "'[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. * * * The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.'" *Chandler* v. *Miller*, 520 U.S. 305, 322 (1997) (quoting *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)). Even assuming that the government now is acting out of the best of intentions, this Court has cautioned that "[t]his nation * * * has no right to expect that it will always have wise and humane rulers * * *. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln." *Milligan*, 71 U.S. at 125. If that ever happens, the "dangers to human liberty" from total judicial deference to the Executive Branch "are frightful to contemplate." *Ibid.* A successful conclusion to the war on terror "will have been in vain" if "we discover that in the process we have destroyed the very freedoms for which we fought." *Estep* v. *United States*, 327 U.S. 114, 132 (1946) (Murphy, J., concurring).

IV. Under The Unique 1903 Lease With Cuba, The United States Exercises At Least Some Sovereign Powers Over The Guantanamo Base.

The government argues that the foregoing principles do not apply to the Guantanamo prisoners—that federal courts have no jurisdiction at all even to consider any claims concerning the detainees' indefinite imprisonment—because the "jurisdictional rule" supposedly established by *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), "is based on sovereignty," and "the Guantanamo detainees are being held outside the sovereign territory of the United States." Br. Opp. 15. The government's argument that the United States exercises no sovereign powers over Guantanamo rests on Article III of the February 1903 lease agreement between the United States and Cuba, which provides as follows:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by the exercise of eminent domain with full compensation to the owners thereof.

T.S. No. 418, Art. III, 6 Charles I. Bevans, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1113, 1114 (State Dep't 1971). Because the lease reserves to Cuba "'ultimate sovereignty' over the naval base" (Br. Opp. 16), the government asserts,

the United States exercises no sovereign powers at the base and, under *Eisentrager*, the people imprisoned at Guantanamo are beyond the reach of any court, including this Court—even though the United States has had "complete jurisdiction and control," T.S. No. 418, Art. III, over the base for more than a century. Indeed, the government apparently has acknowledged "that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees." *Gherebi* v. *Bush*, 2003 WL 22971053, at *13 (9th Cir. Dec. 18, 2003).

We agree with petitioners (Rasul Pet. 19-20) that the government incorrectly focuses on the technical issue of "sovereignty," and that *Eisentrager* authorizes habeas relief where the United States enjoys "territorial jurisdiction," *Eisentrager*, 339 U.S. at 768, 771, 778, 781, as the United States indisputably does at Guantanamo under the express terms of Article III of the 1903 lease. But the government's position is flawed for reasons that go beyond that.

1. The Guantanamo lease is unique. For one thing, the lease is perpetual—the United States can keep the base as long as it likes. The original lease, for "coaling or naval stations," was not subject to any time limitation, T.S. No. 418, and a 1934 treaty with Cuba confirms that the United States may retain the base forever if it wishes: it provides that the lease remains in force "[s]o long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits." T.S. No. 866, Art. III, 6 Bevans at 1161, 1162.

To our knowlege, Guantanamo is the only military base located in another country that the United States is legally entitled to keep in perpetuity. Every other American base overseas is leased for a specific term, and when that term expires, either the base must be closed or the agreement

renegotiated—a process in which the host countries may seek a variety of diplomatic, political and economic concessions in exchange for continued American use of the base. See Robert E. Harkavy, GREAT POWER COMPETITION FOR OVERSEAS BASES 3, 5, 206-209 (1982). That type of "bargained diplomatic exchange" (*id.* at 5) is entirely absent with Guantanamo—the United States may stay at Guantanamo as long as it desires. Cuba has no say in the matter whatsoever. The Castro government has long objected to the base, but the United States has remained.

2. In addition, the government's current interpretation of Article III of the 1903 lease—and of the "ultimate sovereignty" provision in particular—is fundamentally at odds with the interpretation that has long held sway among those within the U.S. military charged with responsibility for Guantanamo and for the negotiation and administration of other base leases.

The most striking evidence of this is found in a history of the Guantanamo Naval Station written in 1953—long before this dispute arose—by Rear Admiral Marion E. Murphy, the Commander at Guantanamo at the time. Marion E. Murphy, THE HISTORY OF GUANTANAMO BAY (1953). Rear Admiral Murphy's history was published by the Navy and is posted to this day on the official U.S. Navy web site (www.nsgtmo.navy.mil/history.htm), which describes the history as a "monumental work," although it adds a disclaimer that the history is not "presented as 'official documentation' * * * by the United States Government or its agencies."

Admiral Murphy's understanding of the lease's "ultimate sovereignty" provision could not have been clearer:

> "Ultimate," meaning final or eventual, is a key word here. *It is interpreted that Cuban sovereignty is interrupted during the period of our occupancy, since we exercise complete jurisdiction and control*, but in

> case occupation were terminated, the area would revert to the ultimate sovereignty of Cuba.

HISTORY OF GUANTANAMO BAY at 6 (emphasis added). Thus, Rear Admiral Murphy explained,

> it is clear that at Guantanamo Bay we have a Naval reservation which, for all practical purposes, is American territory. Under the foregoing agreements, *the United States has for approximately fifty years exercised the essential elements of sovereignty over this territory*, without actually owning it.

Id. at 7 (emphasis added). Moreover, "[u]nless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like." *Id.* at 7-8.

The same practical understanding of the lease is reflected in an analysis published in 1961 by Rear Admiral Robert D. Powers, Jr., then Deputy and Assistant Judge Advocate General of the Navy. *Caribbean Leased Bases Jurisdiction*, 15 JAG J. 161 (Oct.-Nov. 1961).[3] Rear Admiral Powers began by observing that in marked contrast to other American military bases, which "have been leased for a finite term with fixed provisions as to use and jurisdiction," the "bases at Guantanamo Bay in Cuba and the Canal Zone in Panama are unique in their grants of jurisdiction and their indefinite terms of occupancy." *Id.* at 161. Rear Admiral Powers went on to explain:

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[3] As a Navy lawyer, Rear Admiral Powers was directly involved in negotiating and administering base leases, serving, for example, as the legal adviser to the U.S. Negotiating Group in connection with obtaining base rights through agreements with other countries. 15 JAG J. at 161 n.*.

> IT MAY BE said that the words used regarding sovereignty in the two treaties [concerning Guantanamo and the Panama Canal Zone] grant to the United States the complete right in each case to act as the sovereign, with titular or residual sovereignty in the grantor nation. * * * *If merely ultimate sovereignty is recognized by both parties as remaining in Cuba, then the exercise of present or actual sovereignty must be vested in the United States.*

Id. at 163 (emphasis added). While acknowledging "that *all* the rights of sovereignty" might "not pass" to the United States given the lease's recognition of Cuba's "*ultimate* sovereignty," *ibid.*, Rear Admiral Powers recognized that Cuba retained "at most a 'titular' sovereignty," *id.* at 166, a concept that William Howard Taft, as Secretary of War, characterized as "'a barren ideality,'" *id.* at 164. Like the original Panama Canal treaty, the Guantanamo lease provided the United States with a "complete grant of jurisdiction and control, with only a possibility of reversionary or residual jurisdiction in the grantor." *Id.* at 163. The United States thus is "entitled to treat the territory as subject to such laws and administration as it may make applicable." *Id.* at 166.[4]

3. The conclusion that the United States exercises at least some sovereign powers at Guantanamo is found as well in a 54-page Memorandum prepared in 1912 by the State Department's Office of the Solicitor in connection with negotiations then ongoing between the United States and Cuba

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[4] Similarly, the majority in *Gherebi* concluded that as long as the United States retains the Guantanamo base, it "possesses and exercises all of the attributes of sovereignty, while Cuba retains only a residual or reversionary sovereignty interest." 2003 WL 22971053, at *7. Both the majority and dissent recognized that sovereignty can be shared or partial. *Id.* at *9 n.17, *20 n.4.

to extend the boundaries of the Guantanamo base. After reviewing the negotiating history leading up to the 1903 lease, as well as the provision in the lease affording the United States the power of eminent domain, the Solicitor concluded: "[i]t would thus appear that this Government, upon the approval of this Agreement [the 1903 lease] by Cuba, might well have gone into possession immediately and, as *pro tanto sovereign*, have appropriated under the right of eminent domain the private land found within the leased areas." May 7, 1912 Memorandum, at 4 (emphasis added), National Archives, Record Group 59, document no. 811.34537/95. In short, "the Cuban Government is furnishing to this Government the naval reservation and is giving to this Government the *quasi-sovereign rights* granted without any compensation other than the payment of this nominal rent." *Id.* at 10 (emphasis added).

4. Scholars likewise have concluded that the terms of the 1903 lease provide the United States with some type of sovereignty over Guantanamo. Some have concluded that the United States has "territorial sovereignty" over Guantanamo as a result of the lease. See William W. Bishop, Jr., INTERNATIONAL LAW: CASES AND MATERIALS 300 (1953) (noting that "[a]t times one state has acquired by lease rights corresponding more or less closely to territorial sovereignty over parts of the territory of another state," and citing the Guantanamo lease as an example); Robert L. Montague, III, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem*, 50 KY. L.J. 459, 488 (1962) ("the rights conferred upon the United States under this lease amount to 'territorial sovereignty'").

Other scholars agree with Rear Admiral Murphy's view that Cuba's "ultimate" sovereignty over the base means "eventual" sovereignty, *i.e.*, reversionary sovereignty that will become effective only if the United States decides to relinquish the base. See Martin J. Scheina, *The U.S. Presence in Guantanamo*, 4 STRATEGIC REVIEW 81, 82 (Spring 1976)

(the lease "recognized Cuba's continuance of ultimate (final or eventual) sovereignty"); Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT'L L. 730, 735, 740 (1968) (Article III of the 1903 lease "is an express recognition by the parties that Cuban sovereignty over the leased areas rests suspended"; "Cuba has not yet been given the 'ultimate sovereignty' over Guantanamo"); Mary Ellene Chenevey McCoy, *Guantanamo Bay: The United States Naval Base and its Relationship with Cuba* 51 (unpublished Ph.D. dissertation, University of Akron, 1995) (on file at the University of Michigan) ("[t]he word 'ultimate' was interpreted to mean that Cuban sovereignty was interrupted during the U.S. occupancy").

5. Cuban authorities, too, have recognized implicitly that Cuba does not exercise complete sovereignty over the base as a result of the lease. The Cuban Supreme Court held 70 years ago that "the territory of that Naval Station is *for all legal effects regarded as foreign.*" *In re Guzman and Latamble*, Annual Digest & Reports of Pub. Int'l Law Cases, 1933-34, Case No. 43, at 112, 113 (emphasis added). Just six weeks after signing the lease, Cuban President Tomas Estrada Palma told the Cuban Senate that the base had been "cede[d]" to the United States. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES ("FOREIGN RELATIONS"), 1903, at 357. In 1912, the United States and Cuba signed an agreement to expand the base that characterized the 1903 lease as a "cession in lease" by which the base was "ceded in lease" to the United States. FOREIGN RELATIONS, 1912, at 295, 297. (The agreement never went into effect because the Cuban Senate failed to ratify it. Scheina, 4 STRATEGIC REVIEW at 82.) And a book published "under the auspices" of the Cuban government stated that the base had been "formally ceded" to

the United States. 5 Willis Fletcher Johnson, THE HISTORY OF CUBA, page following cover page, 89 (1920).[5]

6. As the long history of Guantanamo demonstrates, Cuba does not presently have—and has not had for the past century—sovereignty in any meaningful sense over the American base at Guantanamo. "'Sovereignty' is a term used in many senses and is much abused," but in general "it implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there." RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 206 comment b (1987). Or as this Court has recognized, "[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Duro* v. *Reina*, 495 U.S. 676, 685 (1990). Cuba has no such power—indeed, it has no power whatever—over Guantanamo. See also *United States* v. *Rice*, 17 U.S. 246, 254 (1819) (Story, J.) (during the British occupation of Castine, Maine in 1814 and 1815, "[t]he sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there").

Rather, it is the United States that acts as sovereign at Guantanamo, for it is United States law that applies there. And it is the United States—and the United States alone—that has the power to enforce its law at Guantanamo over all who set foot within the naval station, including citizens of Cuba. When the United States and Cuba negotiated detailed terms to implement the February 1903 lease, Cuba proposed excluding

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[5] A "cession" is the "act of relinquishing property rights"—the "relinquishment or transfer of land from one state to another, esp. when a state defeated in war gives up the land as part of the price of peace." BLACK'S LAW DICTIONARY 221 (7th ed. 1999).

Cuban citizens from the application of U.S. law: "Cuban citizens who may have committed any crime or misdemeanor within the boundaries of said statio[n] shall be delivered to the Cuban authorities, for trial under the laws and by the tribunals of Cuba." Art. V, draft of proposed Cuban lease terms transmitted by Herbert Squiers, U.S. minister in Havana, to Secretary of State John Hay, Despatch No. 549, June 6, 1903, 7 Despatches from the United States Ministers to Cuba, 1902-1906, National Archives. But the United States rejected that proposal, June 20, 1903 telegram, Minister Squiers to Secretary Hay, *id.*, Despatch No. 572, and the proposed exclusion was dropped from the final agreement of specific lease terms signed by the United States and Cuba in July 1903. Instead, that document provided that *all* "fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within [the naval station], taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities." T.S. No. 426, Art. IV, 6 Bevans at 1121.

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Less than three months after the United States and Cuba signed the Guantanamo lease, President Theodore Roosevelt wrote Secretary of State Hay that "we regard the [Cuban] coaling stations as ours." Theodore Roosevelt to John Hay, May 12, 1903, Theodore Roosevelt Papers, Library of Congress, Manuscript Division, microfilm reel 416. The United States has treated Guantanamo "as ours" ever since—and it is perfectly entitled to continue to "exercise complete jurisdiction and control" (T.S. No. 418, Art. III, 6 Bevans at 1114) over the base as long as it likes. Under these unique circumstances, the government's contention that this Court lacks jurisdiction because *Cuba* is sovereign at Guantanamo, and the United States exercises *no* sovereign powers there, should be rejected.

V. Failure To Provide Any Judicial Review Of The Government's Actions Could Have Grave Consequences For U.S. Military Forces Captured In Future Conflicts.

It is especially important to the members of America's armed forces that American courts have jurisdiction to determine whether the treatment of the Guantanamo prisoners comports with American military regulations incorporating the "competent tribunal" guarantee of the Geneva Conventions. American failure to provide foreign prisoners with the protections of the Geneva Conventions may well provide foreign authorities, in current or future conflicts, with an excuse not to comply with the Geneva Conventions with respect to captured American military forces.

This Court has observed that "[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). See also Max Boot, THE SAVAGE WARS OF PEACE xiv (2002) ("Between 1800 and 1934, U.S. Marines staged 180 landings abroad"). In recent decades, American armed forces have been engaged somewhere abroad nearly every year. The historic pattern shows no sign of abating; "America's strategic situation today presents more opportunities than ever before for * * * entanglements" in "small wars." *Id.* at xix-xx.

It is, unfortunately, inevitable that some American military personnel involved in future conflicts will be captured or taken prisoner. When that happens, the United States government and the families and friends of the detained service men and women will share a strong interest: ensuring that American personnel are treated humanely and fairly.

In past conflicts the United States has insisted that American soldiers held by the enemy be accorded the basic protections of the Geneva Conventions. See, *e.g.*, Maj. Gen.

George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973, at 63 (Dep't of the Army 1975); 64 DEP'T OF STATE BULL. 10 (Jan. 4, 1971) (White House statement announcing President Nixon's call for application of the 1949 Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam and elsewhere in Southeast Asia").

The United States has also demanded application of the principles codified in the Geneva Conventions to captured U.S. service personnel, even when they were taken prisoner under circumstances when the Conventions, technically, did not apply. For example, following the capture of U.S. Warrant Officer Michael Durant by forces under the control of Somali warlord Mohamed Farah Aideed in 1993, the United States demanded assurances that Durant's treatment would be consistent with the broad protections afforded under the Conventions, even though, "[u]nder a strict interpretation of the Third Geneva Convention's applicability, Durant's captors would not be bound to follow the convention because they were not a 'state.'" Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War On Terror,"* 44 HARV. INT'L. L. J. 301, 310 (Winter 2003).[6]

Invoking international human rights standards, the United States also has condemned foreign governments that have held detainees incommunicado, depriving them of the ability to seek judicial review of their confinements. The United States, for example, objected recently when the Liberian government

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[6] American invocation of the Geneva Conventions evidently had its desired effect. "Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, the Red Cross was allowed to visit him and observe his treatment, and he was subsequently released by Aideed as a 'gesture of goodwill.'" 44 HARV. INT'L L.J. at 310.

arrested journalist Hassan Bility and held him incommunicado on the purported ground that he was an "illegal combatant" involved in terrorist activity. AFRICA NEWS, Jan. 3, 2003 (available on Nexis). In a statement issued by our Ambassador in Monrovia, "[t]he United States call[ed] on the Government of Liberia to release those political and other prisoners, including those such as Hassan Bility * * *, who are being held without access to lawyers, the civil courts or independent observers" in "violation of international standards of human rights and legal protection, and contrary to Liberia's basic legal principles." John W. Blaney, Nov. 21, 2002 Press Conference statement (available at http://usembassy.state.gov/monrovia/wwwh112102.html). The Ambassador explained that "our reasons" for seeking the release of Bility—who had "been held in prison for many months without ever having been charged with any crime"—did "not revolve around whether we thought Mr. Bility was or was not guilty of any crime. That is not the point. An honest and competent civil court should have judged that question, not any individual or official." John W. Blaney, Jan. 2, 2003 Statement (available at http://usembassy.state.gov/monrovia/wwwhsp010203.html).

Yet even as American officials condemn other nations for detaining people indefinitely without access to a court or tribunal, authoritarian regimes elsewhere are pointing to U.S. treatment of the Guantanamo prisoners as justification for such actions. Eritrea's Ambassador to the United States defended his own government's roundup of journalists by claiming that their detention without charge was consistent with the United States' detention of material witnesses and aliens suspected by the United States of terrorist activities. Fred Hiatt, *Truth-Tellers in a Time of Terror*, WASH. POST, Nov. 25, 2002, at A15. See also Shehu Sani, *U.S. Actions Send a Bad Signal to Africa: Inspiring Intolerance*, INT'L HERALD TRIB., Sept. 15, 2003, at 6 ("indefinite detention in Guantanamo Bay * * *

helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso").

If American detention of the Guantanamo prisoners —indefinite confinement without any type of review by a court or tribunal—is regarded as precedent for similar actions by countries with which we are at *peace*, it is obvious that it may be similarly regarded by *enemies* who capture American soldiers in an existing or future conflict. As a result, the lives of captured American military forces may well be endangered by the United States' failure to grant foreign prisoners in its custody the same rights that the United States insists be accorded to American prisoners held by foreigners.

The importance of reciprocal treatment of a country's own citizens or soldiers and those of an enemy has an ancient pedigree. Nearly 800 years ago, the Magna Carta provided that foreign merchants from countries at war with England

> "shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be entreated who are then found in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us."

Eisentrager, 339 U.S. at 783 n.11 (quoting Magna Carta, chapter 30, in 3 THE COMPLETE STATUTES OF ENGLAND 27 (Halsbury's Laws of England 1929)).

During the Civil War, President Lincoln ordered that if the South "relapse[d] into barbarism" by murdering or enslaving free black soldiers captured in battle, the Union would "retaliat[e] upon the enemy's prisoners in our possession":

> [F]or every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for every one enslaved by the enemy or

> sold into slavery, a rebel soldier shall be placed at hard labor on the public works and continued at such labor until the other shall be released and receive the treatment due to a prisoner of war.

Order of Retaliation, July 30, 1863, in 6 COLLECTED WORKS OF ABRAHAM LINCOLN 357 (Roy P. Basler ed., 1953).

Reciprocity has been especially significant in the context of the Geneva Conventions of 1949. As noted earlier, the Eisenhower administration, when urging Senate ratification of the Conventions, stressed that American accession to the Conventions would redound to the benefit of captured American soldiers. Senators recognized the same thing. See pp. 6-7, *supra*. In Vietnam, the American decision to apply the Geneva Conventions' principles to captured enemy soldiers was driven in part by the desire to obtain "reciprocal benefits for American captives." Prugh, VIETNAM STUDIES at 62-63. And American insistence that the enemy apply the Geneva Conventions to American POWs in Vietnam saved American lives:

> [A]pplying the benefits of the Convention to those combat captives held in South Vietnam did enhance the opportunity for survival of U.S. service members held by the Viet Cong and North Vietnamese. While the enemy never officially acknowledged the applicability of the Geneva Convention, and treatment of American POWs continued to be brutal, more U.S. troops were surviving capture. Gone were the days when an American advisor was beheaded, and his head displayed on a pole by the Viet Cong. On the contrary, the humane treatment afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and the American POWs who came home in 1973 survived, at least in part, because of [that].

Col. Fred L. Borch, Review of *Honor Bound*, 163 MIL. L. REV. 150, 152 (2000).

In the current debate about the Guantanamo prisoners, commentators have pointed out that "[t]he Geneva Conventions operate on the principle of reciprocity," Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 317 (2002), and that if the United States does not apply the Geneva Conventions, it heightens the risk that captured Americans will be denied the protection of the Conventions by foreigners. See Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59, 90 (2003) ("Interpolating unrecognized exceptions into the contours of prisoner of war status * * * undermines the Geneva Conventions as a whole," and could easily "boomerang to haunt U.S. or allied forces: enemy forces that might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying prisoner of war status. By flaunting international law at home, the United States risks undermining its own authority to demand implementation of international law abroad"); Steven W. Becker, *"Mirror, Mirror on the Wall . . . " : Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563, 572 (2003) (American failure to grant POW status under the Geneva Convention "is placing U.S. military personnel abroad in danger, as we have troops in many parts of the world, and it is reasonable to assume that at some time some of them may be captured. If the same treatment is applied to them, we would be hard put to argue otherwise"); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 340 (2002) (it "seriously disserves the long-term interests of the United States—whose nonuniformed intelligence and military personnel will conduct extensive armed activities abroad in the months ahead—to assert that any captive who can be labeled an 'unlawful combatant' should be

denied prisoner-of-war status under the Geneva Conventions").[7] As one commentator has observed:

> What if another country were to arrest U.S. citizens, take them to a location over which that country had control, but no technical sovereignty, and then argue that the country's own law did not apply in that territory—so that our citizens would not have a right to counsel, or even to know what the charges against them might be? We would be distressed.

Anupam Chander, *Guantanamo and the Rule of Law: Why We Should Not Use Guantanamo Bay to Avoid the Constitution*, FindLaw's Legal Commentary (http://writ.news.findlaw.com/commentary/20020307_chander.html).

In 1950, the *Eisentrager* Court was concerned that permitting German nationals to seek habeas relief—after having received both a trial and post-conviction review by a military reviewing authority (339 U.S. at 766)—would "purchase no equivalent for benefit of our citizen soldiers." *Id.* at 779. The concern about equivalent benefit is different today. In the last half-century, nearly every country on the planet has adopted the 1949 Geneva Conventions, which, among other things, guarantees access to a "competent tribunal" when there is doubt about whether a detainee is a prisoner of war. It is the United States, which has incorporated the Geneva Conventions' competent tribunal

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[7] The danger that captured Americans might be mistreated is increased for those American forces overseas, some in Afghanistan for example, who do not always wear military uniforms. See Mary McGrory, *Bungling on the 9-11 Prisoners*, WASH. POST, Feb. 10, 2002, at B7; John Mintz & Mike Allen, *Bush Shifts Position on Detainees*, WASH. POST, Feb. 8, 2002, at A1; Jess Bravin et al., *Status of Guantanamo Bay Detainees is Focus of Bush Security Team's Meeting*, WALL ST. J., Jan. 28, 2002, at A16.

guarantee into American military regulations, that is presently deviating from international norms. Denying the Guantanamo prisoners access to a competent tribunal increases the danger that captured American forces will receive *that* "equivalent" treatment.

Seventy-five years ago, Justice Brandeis eloquently warned:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that * * * the end justifies the means * * * would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead, 277 U.S. at 485 (Brandeis, J., dissenting). The United States still serves as an example to the world. Our concern is that, in this instance, the government is setting an example that is not only fundamentally at odds with the rule of law, but that puts American troops in peril.

* * *

The questions posed by these cases are momentous. This Court has never held that foreigners captured abroad by the United States may be held indefinitely—perhaps for the rest of their lives—without bringing any charges against them and without ever providing the prisoners with some sort of hearing to determine their status. The importance of this question is magnified because the Guantanamo detentions could last a very long time indeed. The war on terror may go on for decades, and we will not know, at the time, when it is finally over. This war will not end with a surrender ceremony on the deck of the *Missouri*.

The issues in these cases are especially significant to the members of American military forces, who may be denied the protections of the Geneva Conventions in the future by foreign captors using American treatment of the Guantanamo detainees as precedent. If there is a "new paradigm" of warfare following September 11, as some contend, these cases will determine the rules, or lack of rules, that apply to captured prisoners in this new type of war—and potentially to Americans taken captive.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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